IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

WILLIE LYNCH, CASE NO: 1D16-3290

Appellant,

v.

STATE OF FLORIDA,

Appellee,

_____/

MOTION FOR REHEARING AND WRITTEN OPINION

COMES NOW, Appellant, WILLIE LYNCH, by and through undersigned counsel, and files this Motion for Rehearing and Written Opinion pursuant to Rule 9.330(A)-(D), Florida Appellate Procedure. In support, Appellant states the following:

I. BRADY VIOLATION:

In its opinion, this Court asserts that Appellant cannot show that the result of the trial would have been different if the suppressed photographs had been disclosed to the defense. Lynch v. State, -- So. 3d –, 4 (Fla. 1st DCA 2018), 44 Fla. L Weekly D96a, 2018 WL 6803155. This Court notes that "because he cannot show that the other photos the database returned resembled him, he cannot show that they would have supported his argument that someone in one of those photos was the culprit." Id. The Court overlooks the fact that the other photographs were returned by the

facial recognition software as potential matches to the drug seller's photograph. It strains credulity to assume that none of the returned individuals resembled the seller.

Further, the reason that Appellant could not present the photos of the other potential matches was because they are in the possession of the State's agent Cebrica Tenah. Prior to the trial, Appellant requested that the State disclose the photos of the other potential matches. Prior to trial, Appellant moved the trial court to order the State to turn over the photos of the other potential matches. Prior to trial, Appellant requested a two-week continuance in order to subpoena Tenah for trial so he could present this defense. Appellant, who had only recently been allowed to represent himself pro se, promptly did everything in his power to secure the photographs and present his defense at trial. He was thwarted by the State, the trial court, and his former attorney who had failed to subpoena Tenah for trial.

This Court's conclusion that because Appellant cannot show that the photos resemble him he therefore cannot show that the photos are exculpatory rewards the State for its discovery violation. This opinion essentially tells the State that if it realizes that it has failed to disclose potentially exculpatory evidence to the defense then it should just keep it

because if a defendant cannot see the evidence he cannot show that it's exculpatory and his conviction will be affirmed.

To establish a Brady violation a defendant must demonstrate: (1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced. Melton v. State, 193 So. 3d 881, 886 (Fla. 2016). "A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." Id. at 886-87. A reviewing court defers to the factual findings made by the trial court to the extent that they are supported by competent, substantial evidence. Id. at 887. Except, there were never any factual findings made here because the trial court denied Appellant's request for the photos of the other potential matches. The State's evidentiary suppression in this case should undermine this Court's confidence in the outcome of Appellant's trial.

The Court also notes that Appellant's attorney, who Appellant tried to have removed from the case multiple times, stated that she did not want to call Tenah because Tenah's testimony that "Lynch was the man in the officer's photos would only corroborate the officer's testimony." Lynch at 4. First of all, Tenah could not give her opinion at trial that the photo of

Appellant returned by the facial recognition program matched the photo of the drug seller. She was not an eyewitness to the drug sale, she did not have any special familiarity with Appellant, and she is not an expert in photographic identification. Any testimony that she believed Appellant's photo matched the drug seller's photo would therefore have been improper and inadmissible as invading the province of the jury. Charles v. State, 79 So. 3d 233, 235 (Fla. 4th DCA 2012); Ruffin v. State, 549 So. 2d 250, 251 (Fla. 5th DCA 1989); Edwards v. State, 583 So. 2d 740 (Fla. 1st DCA 1991).

Second, Appellant's former attorney's opinion on proper trial strategy is irrelevant and should have no bearing on whether a Brady violation was committed by the State's failure to turn over the photos. Appellant tried multiple times throughout the case to fire his attorney and to represent himself pro se. He disagreed with the way that she was handling his case. Once he was allowed to represent himself pro se he immediately requested the facial recognition program photographs from the State and the trial court. Whether Appellant's former attorney thought this was a wise course of action has nothing to do with whether the State committed a Brady violation or whether the trial court erred by failing to order that the State turn over the photos. Finally, Appellant's former attorney never saw the facial

recognition photos either. She had no better vantage point than Appellant to decide whether he should present the photos and Tenah's testimony at trial. Appellant's defense was misidentification. Photographs of other suspects in the area who resembled Appellant and the drug seller would have been critical to Appellant's defense. Appellant needed the photographs for his defense and he needed Tenah's testimony to lay the foundation to admit the photos into evidence.

Appellant respectfully requests that if this Court is unwilling to reverse his conviction without having seen the photographs of the other potential matches, that this Court remand the case to the trial court for an evidentiary hearing where the State must produce the photographs at issue and place them into the record so that the trial court can make factual findings. If any of the photographs of the other potential matches from the facial recognition program resemble the drug seller or Appellant then clearly there was a Brady/discovery violation and Appellant should be granted a new trial so that he may exercise his constitutional due process right to present a defense. If none of the photographs resemble Appellant or the drug seller then Appellant's right to present a defense was not violated by the State's failure to provide the photographs and his conviction will stand. A district court of appeals has the authority to remand for an evidentiary

hearing after a criminal conviction so that factual findings can be made on the record. See Dixon v. State, 768 So. 2d 464, 464-65 (Fla. 3d DCA 1999); Mackey v. State, 55 So. 3d 606, 611 (Fla. 4th DCA 2011); Sneed v. State, 934 So. 2d 475, 477 (Fla. 3d DCA 2004); Marshall v. State, 593 So. 2d 1161, 1165 (Fla. 2d DCA 1992); Wood v. State, 238 So. 3d 924, 925 (Fla. 1st DCA 2018).

II. UNNECESSARILY SUGGESTIVE IDENTIFICATION:

The Court quotes Manson v. Braithwaite, 432 U.S. 98 (1977), in concluding that the officers' identification of Appellant as the drug seller was reliable. Lynch at 6. This Court quotes Manson's statement that "juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Lynch at 6. Since 1977 when Manson was issued, much has changed in the scientific understanding of eyewitness identification. Its limits have become clearer, and the dangers of misidentification and wrongful convictions have become more well-known. The Florida Supreme Court has recognized that eyewitness misidentification is the single greatest cause of wrongful conviction in this country. Peterson v. State, 154 So. 3d 274, 286 (Fla. 2014) (Pariente, J. concurring), citing State v. Delgado, 902 A.2d 888, 895 (2006).

Eyewitness misidentification has played a role in seventy-five percent of convictions that have been subsequently overturned through DNA testing. Peterson at 286 (Pariente, J. concurring), citing the Florida Innocence Commission's *Final Report to the Supreme Court of Florida* (2012). Four years ago, the Florida Supreme Court acknowledged that "subsequent research in the area of eyewitness identification has clearly demonstrated that the reliability of eyewitness identification testimony is subject to a multitude of factors, the effects of which are often not within the realm of an average juror's general knowledge." Peterson at 286 (Pariente, J. concurring). In light of the increasing awareness of the scientific evidence of the limits and dangers of eyewitness misidentification, this Court should reconsider its faith in juries' "ability to measure intelligently the weight of identification testimony that has some questionable feature."

This Court in its calculus regarding the reliability of the identification noted that only about eight days passed between the crime and the officers' identification of Appellant as the culprit. Lynch at 5. In actuality at least sixteen days elapsed between the crime, which occurred on September 12, 2015, and the identification of Appellant by the officers. Detective Canaday testified in his deposition that he received a notification of a possible identification of the suspect from Tenah on September 28, 2015 (Supp R I

22). In light of the extra eight days Appellant respectfully requests that the Court reconsider its finding that the identification was reliable.

III. DISCOVERY VIOLATION / FAILURE TO HOLD ADEQUATE RICHARDSON HEARING:

The State failed to turn over the photos after Appellant requested them. They were exculpatory in that they were returned by the facial recognition software as potential matches to the drug seller. The fact that they are not in the record is not due to a failure on Appellant's part, but instead because the State's agent was in possession of the photos, the State did not provide them to the defense, and the trial court failed to order the State to turn them over to the defense. When Appellant made the trial court aware of the State's discovery violation, the trial court, without ever looking at the photos, denied Appellant's request and ruled that the photos were not relevant because they were not shown to the officers. This was clear error. The photos were of other potential culprits who the facial recognition software returned as possible matches to the drug seller. Appellant's defense was misidentification. The photos at issue could not be more relevant. The trial court abused its discretion when it determined that the photos were not relevant because its conclusion was based on an erroneous determination of the law and the facts. The trial court had an affirmative

obligation to conduct an adequate Richardson hearing. Brown v. State, 640 So. 2d 106 (Fla. 4th DCA 1994). Where it never even looked at the photographs to see if they did indeed resemble Appellant or the drug seller the trial court failed this obligation.

This Court must determine whether the photos could have benefitted Appellant in his trial preparation or strategy, and in making that determination should consider every conceivable course of action open to Appellant. Giles v. State, 916 So. 2d 55, 58 (Fla. 2d DCA 2005). One course of action was that if the State had provided Appellant with the photos of the other potential matches he could have introduced them at trial and argued to the jury that one of those individuals was the actual drug seller in support of his misidentification defense. The State's discovery violation and the trial court's ruling deprived him of that course of action.

Appellant respectfully requests a rehearing. Though this Court has "carefully considered all arguments presented," Appellant respectfully requests that this Court submit an amended written opinion which addresses the State's discovery violation under Rule 3.220, Florida Rules of Criminal Procedure, and the correctness of the trial court's Richardson ruling. Appellant requests a written opinion addressing these matters because a written opinion would provide an explanation for the Court's apparent

deviation from prior precedent regarding Richardson hearings and discovery violations or it would provide a legitimate basis for Florida Supreme Court review where this Court's holding regarding the Richardson hearing and the discovery violation conflicts with holdings from other district courts of appeal. See State v. Cruz, 851 So. 2d 249 (Fla. 3d DCA 2003); Brown v. State, 165 So. 3d 726 (Fla. 4th DCA 2015). A trial court's discretion in ruling on a Richardson violation can only be exercised following a proper inquiry. Brown at 729. The failure by the trial court to even review the evidence at the heart of the Richardson violation was clearly error. The trial court's conclusion that the photos were not relevant was error. Where there has been an inadequate Richardson hearing the discovery violation is reviewed for harmless error. Id. However, the discovery violation can be found harmless only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation. Id. This Court cannot conclude that the error was harmless beyond a reasonable doubt without the benefit of reviewing the photos.

As he did with regard to the Brady violation issue above, Appellant respectfully requests that if this Court is unwilling to reverse his conviction without having seen the photographs of the other potential matches, that this Court remand the case to the trial court for an evidentiary hearing where the

State must produce the photographs at issue and place them into the record so that the trial court can make factual findings.

IV. DENIAL OF MOTION TO CONTINUE:

Appellant respectfully seeks an amended written opinion that addresses the trial court's denial of Appellant's continuance request. Appellant requests a written opinion addressing this issue because a written opinion would provide an explanation for the Court's apparent deviation from prior precedent in Madison v. State, 132 So. 3d 237 (Fla. 1st DCA 2013), and McKay v. State, 504 So. 2d 1280 (Fla. 1s t DCA 1986), where this Court held that a trial court **must** consider the following factors when deciding whether to grant a continuance so a defendant can retain counsel of his choice: (1) time available for preparation; (2) likelihood of prejudice from the denial; (3) defendant's role in shortening preparation time; (4) complexity of the case; (5) availability of discovery; (6) adequacy of counsel actually provided; and (7) skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime. Madison at 241-42, citing McKay at 1282. See also Brown v. State, 66 So. 3d 1046 (Fla. 4th DCA 2011). The same list of factors is to be applied when a defendant requests to represent himself and asks for a continuance.

Sessions v. State, 965 So. 2d 194 (Fla. 4th DCA 2007). The trial court in the instant case failed to consider most if not all of these factors.

Subsequent three-judge panels of the First District cannot overrule prior First District precedent. See Adams v. State, 188 So. 3d 849, 851 (Fla. 1st DCA 2012) citing In re Rule 9.331, 416 So. 2d 1127, 1128 (Fla. 1982). In re Rule 9.331 states that a three-judge panel of a district court should not overrule or recede from a prior panel's ruling on an identical point of law. Id. at 1128. Rule 9.331 contemplates that a three-judge panel of a district court confronted with precedent from the same district with which it disagrees should suggest an en banc hearing or certify the issue to the Florida Supreme Court. Id. A written opinion would also provide a legitimate basis for Florida Supreme Court review because this Court's holding conflicts with other holdings from this Court and from other district courts of appeal.

WHEREFORE, Defendant respectfully requests that this Court grant Appellant's Motion for Rehearing and Written Opinion as to the foregoing issues. Appellant respectfully requests that if this Court is not inclined to reverse Appellant's conviction that this Court remand the case to the trial court to hold an evidentiary hearing where the State must produce the photographs at issue and place them into the record so that the trial court can

make factual findings. Appellant respectfully requests that this Court issue an amended opinion addressing its decisions regarding the trial court's Richardson hearing, the trial court's ruling on the discovery violation under Rule 3.220, and the trial court's denial of Appellant's motion to continue.

I HEREBY CERTIFY that a copy of the foregoing has been forwarded to Assistant Attorney General Trisha Pate at crimapptlh@myfloridalegal.com, this 11th day of January, 2019.

Respectfully Submitted,

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